

E-Filed 6/14/06

NOT FOR CITATION

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

GARDEN CITY BOXING CLUB,

Plaintiff,

V.

BENJAMIN SANCHEZ, ET AL.

Defendants.

Case Number C 05-5005 JF

ORDER¹ (1) DENYING DEFENDANTS' MOTION TO DISMISS FOR UNTIMELY SERVICE AND IMPROPER VENUE, AND (2) TRANSFERRING ACTION FOR IMPROPER VENUE

[re: docket nos. 5, 6, 7, 8]

I. DISCUSSION

Defendants move to dismiss this action on two grounds: untimely service and improper venue. The motion has been fully briefed, and the Court has determined that the motion is appropriate for disposition without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons set forth below, the motion will be denied, and the action will be transferred to the San Francisco/Oakland Division.

¹ This disposition is not designated for publication and may not be cited.

1 **A. Untimely Service**

2 Defendants argue that this action should be dismissed because service was untimely.
 3 Plaintiff concedes that neither Defendant was served within 120 days of the filing of the
 4 complaint as required by Rule 4(m) of the Federal Rules of Civil Procedure. Benjamin Sanchez
 5 and Erica Jennifer Sanchez were served 136 and 137 days, respectively, after the complaint was
 6 filed. Rule 4(m) states that:

7 If service of the summons and complaint is not made upon a defendant within 120
 8 days after the filing of the complaint, the court, upon motion or on its own
 9 initiative after notice to the plaintiff, shall dismiss the action without prejudice as
 to that defendant *or direct that service be effected within a specified time*;
 10 provided that if the plaintiff shows good cause for the failure, the court shall
 extend the time for service for an appropriate period.

11 Fed. R. Civ. P. 4(m) (emphasis added).

12 Plaintiff argues that the Court should exercise its discretion and extend the time for
 13 service because the delay in service was minimal and non-prejudicial to Defendants.² The Court
 14 will exercise its discretion to extend the time for service such that the service on Defendants shall
 15 be considered timely. However, the Court cautions Plaintiff and its counsel to exercise greater
 16 diligence regarding deadlines in the future.

17 **B. Improper Venue**

18 Defendant moves to dismiss, arguing that the proper venue for this action is the San
 19 Francisco Division, rather than the San Jose Division of this Court. Plaintiff agrees that venue is
 20 improper but argues that dismissal is an unnecessarily harsh remedy for an inadvertent filing
 21 error, and that transfer is a more appropriate remedy. Under Civil Local Rule 3-2(c)-(d), the
 22 Court finds that because this action arises in Sonoma County it should be assigned to the San

23 ² Defendants' motion and reply emphasize that Plaintiff has not shown good cause
 24 for the delay. However, as Plaintiff points out, under the current Rule 4(m), even when "good
 25 cause does not exist, the court may in its discretion decide whether to dismiss the case without
 26 prejudice or extend time for service." *Petrucelli v. Boehringer and Ratzinger GmbH*, 46 F.3d
 27 1298 at 1305 (3d Cir. 1995). The Advisory Committee's note on Rule 4(m) explains that it
 28 "authorizes the court to relieve a plaintiff of the consequences of an application of [the]
 subdivision even if there is no good cause shown." Fed.R.Civ.P. 4(m) advisory committee's note
 (1993).

1 Francisco/Oakland Division, rather than the San Jose Division. The Court agrees that the action
2 should be transferred to the proper venue in accordance with Local Rule 3-2(f).

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4 **II. ORDER**

5 Good cause therefore appearing, IT IS HEREBY ORDERED that Defendants' motion to
6 dismiss is denied. Time for service of the complaint upon the Defendants is hereby extended by
7 seventeen days. Pursuant to Northern District of California Civil Local Rule 3-2(d) this action is
8 transferred to the San Francisco/Oakland Division. The Clerk of the Court will reassign this case
9 to a judge in the San Francisco/Oakland Division, pursuant to this Court's Assignment Plan.

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13 DATED: June 14, 2006

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JEREMY MOGEL
United States District Judge

1 This Order has been served upon the following persons:

2 Thomas P. Riley tprlaw@att.net

3 Elizabeth R. Palmer epalmer@majlaw.com

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